IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1636

DAVID UNGAR, et al. and JOHN RADER, et al.,
Petitioners,

v.

DUNKIN' DONUTS OF AMERICA, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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Petitioners' reply brief is devoted to discussion of the recent decision of the Second Circuit in *Hill* v. *A-T-O, Inc.*, 1976-1 Trade Cas. ¶ 60,873 (2d Cir. May 10, 1976). Petitioners argue that "the present case is identical to the *Hill* case" (Reply Br. at 2) and that

the ruling in *Hill* is "in direct conflict" with the decision below (*id.* at 1).

Petitioners' assertions are incorrect. The instant case is fundamentally different from *Hill* and there is no conflict whatever between them.

Hill involved "an *admitted tie* between two clearly separate products . . . . It is *undisputed* that the only way that membership in the . . . buying service could be obtained . . . was through purchase of the . . . vacuum cleaner" (1976-1 Trade Cas. ¶ 60,873 at 68,824; Reply Br., Exh. 1 at 18; emphasis supplied). Since there was no dispute that tying (*i.e.*, sales on condition) had taken place, proof of "actual coercion" was superfluous in *Hill*. Accordingly, the court of appeals reversed the district court, which had ruled that, even though tying was admitted, plaintiffs were required to prove "actual coercion" as an additional element of the tying offense.

In the present case, by contrast, the existence of a tie is vigorously disputed and the central issue is the nature of proof necessary to establish that tying occurred.[1] The district court below ruled that proof of a "*policy to persuade* the franchisees to accept the allegedly tied items" was adequate to establish tying (A. 180; *see also* A. 81-82, 100-03, emphasis supplied). The court adopted this standard because of its belief that "there can indeed be a 'voluntary,' yet illegal tie" (A. 79). The court of appeals held this ruling was erroneous: proof of a "policy to persuade" cannot establish the existence of a tie because it does

[1] Unlike the present case, there was no issue on appeal in *Hill* regarding the propriety of the class certification (1976-1 Trade Cas. ¶ 60,873 at 68,822 n.1, Reply Br., Exh. 1 at 13 n.1).

not demonstrate that the seller *requires* purchasers to take the allegedly tied item as a condition of obtaining the tying item (A. 191-93).[2]

The decisions of this Court and the lower federal courts—including the decisions of the court of appeals below and the Second Circuit in *Hill*—have consistently rejected the notion that there can be a voluntary, yet illegal, tie. *E.g., Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 6 n.4 (1958). When the existence of tying is disputed, as it is in this case, the plaintiff must show "actual coercion," *i.e.*, "that he was the unwilling purchaser of the tied product." *Capital Temporaries, Inc.* v. *The Olsten Corp.,* 506 F.2d 658, 661, 663 (2d Cir. 1974). Thus, petitioners were obligated to show not merely a policy to persuade, or that many franchisees purchased or leased the allegedly tied items, but also that the purchase of those items was coerced rather than voluntary. Since it was conceded by the district court that such proof raises predominantly individual issues (A. 131), the court of appeals correctly reversed the class action certification.

There is plainly no conflict between *Hill* and the decision below. The two cases are so different on their facts that it is not surprising that the Second Circuit

[2] A "policy to persuade" is thus different from the "unremitting policy of tie-in" which was admitted in *Hill* (1976-1 Trade Cas. ¶ 60,873 at 68,825; Reply Br., Exh. 1 at 22) or a "policy to condition" (Reply Br. at 2). Similarly, the alternate proof held sufficient by the district court and rejected by the court of appeals—that a large number of franchisees in fact bought the allegedly tied items—does not entail a showing that the seller requires purchasers to take the allegedly tied item. *See* Resp. Opp. at 6.

in *Hill* did not even cite the decision of the court of appeals in the instant case.[3] Yet, both decisions recognize and apply established principles regarding the proof necessary to demonstrate an illegal tie-in. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] In another recent decision, *Hehir* v. *Shell Oil Co.*, 1976-1 Trade Cas. ¶ 60,928 (D. Mass., No. 75-855-M, June 1, 1976), the court relied explicitly on the decision of the court of appeals in the instant case in declining to certify a class action in a tying case because of the necessity of proof of individual coercion.